



MAY 2004 -- VOL. 46 No. 5

Appraising Intangibles: How Jurors Award Non-Economic Damages

Harry J. Plotkin
Jury Consultant

When it comes to awarding non-economic damages, jurors often find themselves lost at sea without a compass; measuring quantities such as pain and suffering, loss of consortium, and emotional distress are exercises in subjectivity that jurors often struggle to accomplish with any degree of confidence. As a result, valuations of non-economic damages can vary wildly from jury to jury, so it is the responsibility of the savvy plaintiff attorney to guide the jury through this complex deliberation process. In order to effectively strategize and present a compelling case for compensating an injured plaintiff fairly, an attorney must first understand the processes and criteria used by jurors in determining non-economic damages.

When determining the appropriate amount of non-economic damages to award, jurors must reconcile a number of factors. How debilitating is the injury; how much will it impact the plaintiff's lifestyle? How honest were the plaintiff and the experts in describing the extent of the injury; did they exaggerate? How much would I value the types of activities that the plaintiff can no longer participate in, and how much did the plaintiff actually value the activities he can no longer enjoy?

The essential criteria jurors use to determine non-tangible damages involve three categories: the credibility of the plaintiff's claims, the severity and impact of the injury on the plaintiff's lifestyle, and a subjective valuation of that impact on a human life.

A juror's assessment of the severity and impact of the plaintiff's injury is an emotionally charged process. The description of the injury (whether physical, psychological, or even financial) and its impact on the victim's lifestyle is often a poignant, depressing presentation designed to induce feelings of pity and sympathy toward the plaintiff from the jury. The presentation of such issues may involve emotional testimony from family and friends, graphic descriptions of mental and physical damage by expert witnesses, emotional pleas by plaintiff counsel, a moving day-in-the-life video, and in many cases direct testimony by the plaintiff. In assessing how bad the injury was and how much it has impacted the life of the victim, jurors not only absorb the emotional content of the injury presentation but also scrutinize the plaintiff in court, both on and off the stand.

Jurors will consciously focus on the plaintiff's demeanor, emotional state, and evidence of physical or emotional injuries. Jurors will scrutinize the minutest of details, such as how badly the plaintiff is limping or how fondly the plaintiff speaks of a hobby in which he or she can no longer participate.

While analyzing the plaintiff's injury and its impact on his lifestyle, jurors will simultaneously scrutinize the credibility of the plaintiff and of his claims. To a certain degree, all modern jurors approach trial cynically and will assume that some lawsuits are frivolous and that some plaintiffs make false or exaggerated claims. As a result, jurors heavily scrutinize the entire plaintiff case, from experts and witnesses to the attorney to the plaintiffs themselves. This scrutiny makes it crucial for experts to appear unbiased, objective, competent and, most importantly, likeable and patient in communicating with both trial teams and the jury. As illogical as it may sound, jurors often equate unlikeability with dishonesty. If an expert is arrogant, condescending, hostile, or short-tempered (especially during cross-examination), the jury will often disregard that expert's testimony, regardless of scientific merit.

In the same way, jurors will closely scrutinize the integrity and likeability of plaintiff's counsel and the plaintiff. The attorney's trial strategy often plays a large role in shaping credibility. Too many experts may make the panel appear to be hired guns and the plaintiff's claims over-reaching; not enough experts may make the plaintiff's case seem insubstantial and unsupported. Plaintiff's attorney should be passionate but professional. An emotional trial demeanor or closing argument runs the risk of "laying it on too thick," and the jury feels manipulated; a matter-of-fact style may seem inappropriately business-like in an emotional trial. Perhaps most importantly, the credibility of the plaintiff's claims is tested by the demeanor, emotional or physical state, and likeability of the plaintiff himself. After hearing of the injuries suffered and the impact on the plaintiff's lifestyle, jurors will develop a mental picture of how the victim should act, look, and feel in response to his unfortunate situation. If the plaintiff does not fit that mental image perfectly, the jurors will assume that the description of the plaintiff's claims was exaggerated, damaging his credibility. For example, if a grieving mother laughs or smiles in the courtroom, no matter how briefly or in what context, the jurors' mental image is compromised. The same can be said for an injured plaintiff walking gracefully, or a cognitively impaired plaintiff conversing smoothly, or a financially ruined plaintiff wearing an expensive suit. Conversely, the plaintiff's credibility can be impaired if a plaintiff behaves or appears worse than the jurors' mental image. If a plaintiff with minor injuries appears in court in a wheelchair or cervical collar, the jury will likely feel manipulated and react negatively.

Once jurors have assessed the extent of the plaintiff's injury, its impact on his lifestyle, and have adjusted for perceived exaggerations, the final step in damage valuation is to put a price on the impacted lifestyle. As in any facet of human decision-making, jurors draw upon their own experience when awarding non-economic damages. In measuring the value of an impacted lifestyle, jurors will always put themselves in the plaintiff's shoes and attempt to determine the price that they themselves would place on the physical or emotional damage suffered. Once a juror has estimated the personal value of this

damage, they will next adjust that figure to reflect perceived differences in values between themselves and the plaintiff. For example, a juror may value her own emotional distress from watching her daughter undergo an emergency surgery at \$50,000 but might then downgrade that value to \$10,000 if she believed the plaintiff to be a less caring parent than herself.

In any case, the crucial idea is that jurors utilize their own experience and values in appraising the non-economic damages of others. And, since experiences and values vary widely among individuals, it is natural that the valuation process will vary widely among different jurors. As a result, it is critical for plaintiff attorneys to identify those jurors who are comfortable awarding the types of non-economic damages being sought.

Some categories of juror are relatively simple to identify. Caring parents place a high value on the welfare of their children. Active, happy jurors with a zest for life place a premium on the enjoyment of life and unmitigated health. Unhappy jurors who lack hobbies and free time generally devalue handicapping injuries; with few exceptions, a marathon runner would award significantly higher non-economic damages to a paraplegic plaintiff than would a couch potato.

Yet most of the disparity among juror attitudes toward damages is of less obvious origin. For example, research has shown so-called “realistic” jurors, whose ranks include constructive personalities with traditional values (blue-collar occupations, technical jobs, military, etc.), to be uncomfortable justifying and awarding intangible, non-economic damages. Realistic jurors tend to be concerned with solving legal disputes fairly and logically, and as such prefer to remedy injuries with realistic, calculatable damages such as lost earnings, medical bills, or property values. Due to the background attitudes, values, and personalities of these realistic jurors, they generally fail to understand the need for awarding additional damages for ambiguous injuries that cannot be remedied. On the other hand, so-called “social” jurors, whose ranks include sympathetic personalities who value the welfare of others (nurturing occupations such as school teachers, social workers, pediatricians, therapists, parents, coaches, etc.), tend to award the highest non-economic damages of all juror types. Concerned primarily with helping others and protecting the victims of wrongdoing, social jurors are highly influenced by emotional trial content and empathize easily with feelings of pain and suffering, mental anguish, and the loss of joy.

Despite having the aforementioned cognitive tools at their disposal, jurors still face the daunting task of putting a firm dollar amount on an injury. By definition, non-economic damages are subjective and non-quantifiable. There is no proven formula for valuing a change in lifestyle, nor is there even an accepted legal precedent. Jurors are fully aware of the arbitrary nature of the task they are handed in awarding these damages and, as a result, jurors often lack confidence in their personal ideas about damage valuations. In these situations, jurors are far more open to external interpretations of non-economic damages than they would be about liability and tangible damages. In appraising non-economic damages, juries are heavily influenced by outspoken jurors, the consensus of the group, and most notably the suggestions of the plaintiff’s attorney.

Because jurors realize that there is no single “right” answer in arbitrarily valuing ambiguous quantities, the best guess of a single outspoken juror who has strong ideas, an expert psychologist, or even the plaintiff’s attorney is often accepted as an estimate as reasonable as any other. A deliberating jury will often use such a suggestion in a decision-making process known as “anchoring and adjustment” (Kahneman & Tversky, 1974). In making a damage judgment under uncertainty and without guidance, jurors will often grasp an anchor and proceed to adjust it to some extent to reflect what seems to be fair or appropriate. Studies show that experimental subjects tend to adjust to a final decision that is relatively close to the anchor suggested. Thus, in most cases, the higher the anchor, the higher the number decided upon; the lower the anchor, the lower the number decided upon. Of course, in a legal setting the suggestion of an unrealistically large award can backfire. If the suggested number seems to be overreaching or unfair to the defendant, jurors may become angry and react by awarding a lower amount than they would have otherwise. However, a suggestion that seems reasonable is often accepted with little thought by a jury, especially if no single juror raises a major objection. In the absence of a vocal objection, a group mentality often emerges among the jurors to accept the estimate, its acceptance reinforced by the uncertainty of a “right answer” and the simple confidence that, if the estimate were out of line, one out of twelve logical people would have objected.

For the average juror, the task of valuing an intangible property such as pain and suffering is a daunting task that cannot be accomplished with any degree of confidence. As a result, jurors are forced to become reliant on the advice and ideas of others in their evaluation process—the ideas of the litigants, the experts, the attorneys, and their fellow jurors. Because the jurors are dependent on the ideas of these trial figures, they will place great emphasis on choosing who and what to believe. At the same time however, the valuation process requires each juror to put themselves in the plaintiff’s shoes and to base his or her decision on their own personal values toward the enjoyment of their life and the elements of their lifestyle. It is to the advantage of the savvy plaintiff’s attorney then to ensure that their case paints an empathetic, credible, and persuasive picture of the plaintiff’s injury that each juror will relate to and feel comfortable compensating in an appropriate way.

Harry Plotkin is a jury consultant in Los Angeles. Mr. Plotkin specializes in assisting trial attorneys in jury selection and crafting persuasive opening statements and trial strategies. He can be reached at 626-975-4457 and at harry@yournextjury.com.